

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7447

ORIGINAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

MADELINE ERIA, Individually and as Administratrix of the goods,
chattels and credits which were of VINCENT M. ERIA, deceased,

Plaintiff,

—against—

TEXAS EASTERN TRANSMISSION CORP. TEXAS EASTERN
CRYOGENICS, INC., BROWN & ROOT, INC., NAPP GRECCO
COMPANY, BATTELLE MEMORIAL INSTITUTE, THE DOW
CHEMICAL COMPANY, G. T. SCHJELDAHL, INC. and E. I.
DuPONT DE NEMOURS & CO.,

Defendants.

TEXAS EASTERN TRANSMISSION CORPORATION and
TEXAS EASTERN CRYOGENICS, INC.,

Defendants-Appellants,

—against—

THE DOW CHEMICAL COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of New York

BRIEF OF DEFENDANT-APPELLEE



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Preliminary Statement

The United States District Judge whose order the defendants-appellants have seen fit to appeal from is the Honorable Mark A. Costantino.

Statement of Issues Being Presented for Review

Whether the Honorable Mark A. Costantino has the discretion to interpret and enforce his own Order dated March 14, 1975, as contained in his Memorandum and Order of August 1, 1975; whether said Memorandum and Order of August 1, 1975 is appealable being an Interlocutory Order; and whether or not said Memorandum and Order contains an injunction.

Statement of the Case

In 1968, construction of a liquified natural gas storage tank was commenced in Staten Island, New York. This tank was owned by Texas Eastern Cryogenics, Inc., and thereafter operated by Texas Eastern Transmission Corporation (hereinafter collectively referred to as "Texas Eastern"). During that same year, 1968, The Dow Chemical Company ("Dow") sold and delivered insulating material, which product was thereafter installed within the tank by Texas Eastern during the balance of 1968 and 1969 (A, p. 33a).*

In August of 1970, the tank was placed in operation, filled with liquified natural gas and continued in operation until April of 1972, a period of twenty-one months, when it was taken out of service to permit repairs made necessary by leaks and other causes (A, p. 34a). The above operation, unfilling and taking the tank out of operation was performed by Texas Eastern, as owner and operator of the tank.

* Citations noted in this manner are to the Appendix to this appeal.

The repair operations continued for ten months, under the direction, control and guidance of Texas Eastern, when on February 10, 1973, an explosion occurred at the tank. At the time of the explosion more than forty workmen were inside of the tank, continuing repairs.

Thirty-six actions for wrongful death and conscious pain and suffering were instituted by the survivors of the workmen, which suits named as defendants, in either Federal or State Courts, Texas Eastern and more than forty other parties. Dow has been named as either a defendant or third-party defendant therein.

All such defendants, third and fourth-party defendants have cross claimed against each other for contribution and/or indemnification.

One year, eleven and three-quarter months after the explosion and fire, Texas Eastern filed a Complaint against Dow (in February of 1975) in the District Court of Harris County for the 157th Judicial District of Texas for property damages allegedly resulting from the above incident (A, p. 29a). The Complaint in the Texas State Court was amended several months thereafter, to include as a defendant, Battelle Memorial Institute ("Battelle").

Discovery proceedings in the wrongful death actions, as consolidated in the Eastern District of New York (hereinafter referred to as the "Federal Court Action") were in fact under way at the time of service of the Texas Eastern Complaint (A, p. 62a) and pursuant to Order of Honorable Mark A. Costantino, production of documents by Dow, consisting of more than thirty-six thousand pages began on March 10, 1975 (A, p. 63a).

The scheduled production had been contemplated for a considerable period of time by all parties to both the Federal and State Court actions prior to the actual date of

production. The representation of Dow in the State Court action by the law firm of Bracewell & Patterson, was made known to Texas Eastern and an answer to the State Court Complaint was being drawn, when on March 4, 1975, Texas Eastern obtained, ex parte, an Order of the Texas State Court based on the allegation that Dow was secreting witnesses which Order directed the appearance of three Dow personnel, resulting in Dow's application, on notice to all parties, for a hearing on this obvious conflict on March 12, 1975 before Honorable Judge Mark A. Costantino (A, p. 76a).

The entire problem was explored at this conference, and resulted in a stipulation which explicitly was to "... cover all contingencies" (A, p. 91a).

An Order based on the said stipulation was signed by Judge Costantino on March 14, 1975 (A, p. 94a).

Under the terms of the stipulation (A, p. 92a) the parties thereto were not "bar[red from] any or all other proceedings that either party cares to move on." Further, the stipulation solely applied to *discovery proceedings* in the "Texas Court" (Id.). These latter portions of the said stipulation allowed the pressing, by Dow, in the State Court action of the "plea in abatement" which was aimed at abating the entire State Court action. This plea was denied by the same State Court Judge who granted Texas Eastern's aforesaid ex parte Order.

On July 16, 1975, Texas Eastern served on Dow a State Court Notice to Take Oral Deposition, dated July 21, 1975, which by its terms, directed the production, again, of extensive documents and witnesses (A, pp. 113a-115a). Because of the ongoing discovery proceedings in the Federal Court action and concomitant settlement negotiations, a further hearing on this situation was scheduled before Honorable Mark A. Costantino by letter dated July 16, 1975 (A, p. 103a).

After a full hearing on all issues held on July 23, 1975, (A, p. 116a), Judge Costantino issued his "Memorandum and Order" dated August 1, 1975, (A, p. 139a), which by its very words was but "... determining the intentions of the parties at the time the stipulation was made". (A, pp. 142a-143a).

Texas Eastern saw fit to file, on August 4, 1975, a Notice of Appeal (A, p. 144a) from this Memorandum and Order.

An FRCP Rule 54(b) certification has not been obtained or requested.

A R G U M E N T

P O I N T I

The Memorandum and Order at issue is a non-final, non-appealable Interlocutory Order.

Contrary to the position of Texas Eastern, the very wording of the Memorandum and Order of Judge Costantino is merely an interpretation and enforcement of his own prior Order. Although Texas Eastern has repeatedly stated the said Memorandum and Order to "contain" an injunction, they have never indicated or pointed out any words, phrases, sentences or intent which would factually support this contention.

It is hornbook law that not every Interlocutory Order containing words of restraint is an injunction:

(*Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176; *Fleischer v. Phillips*, 264 F. 2d 515, 516, cert. denied, 359 U.S. 1002). While it is true that "All Orders of Court are mandatory in the sense that they are to be obeyed . . ." (*O'Malley, et al. v. Chrysler Corp.*, 160 F. 2d 35,

37) it must be conceded by Appellants that "... many Orders that compel or restrain conduct are nothing more than exercises of the District Court's power to control the proceedings before it; they are not injunctions even though they are case in injunctive terms". (*Moore's Federal Practice*, 2d Ed., Vol 9 pgs 207-208).

If an Order is one that defers the taking of a deposition of one party to a suit by another party, such an Order has been held to be non-appealable (*Whittle v. Tawes*, 343 F. 2d 428) (4th Cir. 1965). This type of Order "... is a routine procedural step in the normal administration of the case and obviously not the type or Order that may be reviewed before the final determination of the case ..." (*Whittle v. Tawes*, supra).

In the case at bar, the District Court did nothing more than issue an Order, which in the Court's discretion, would advance the cause before trial. "There would be nothing final about such Order (s)." (*O'Malley v. Chrysler Corp.*, 160 F 2d, 35, 36).

Indeed, the said Order by its very words involves merely an "... application to have the terms of a stipulation ... interpreted and enforced." (A, p. 139a). Again as Judge Costantino points out, "The question before this Court is very simply whether TETCO is bound by the March 12 stipulation ... thus stated the problem becomes determining the intentions of the parties at the time the stipulation was made." (Id.)

It is submitted that Judge Costantino has "lived" with this case for over two and one-half years. Surely his interpretation of his own Order, based as it was on the facts and surrounding circumstances of this litigation as well as the expressed, reasoned and voluntary stipulation of the parties, should be binding as final.

It should be emphasized that Texas Eastern is not precluded from proceeding against Battelle (a co-defendant in the State Court action) by way of deposition, interrogatories or other discovery devices. Voluntarily, they have chosen not to do so. How then can any irreparable harm be claimed? By their own reasoned choice, they have chosen to delay the State Court action, they have sidestepped the State Court procedural remedies and instead have sought relief by way of appeal of Judge Costantino's Order.

Since, by its very terms, the Order appealed from is not an injunction, it can only be interlocutory in nature. Being interlocutory in nature, an FRCP Rule 54(B) certification is mandated. No such certification has been obtained, and therefore, under the "finality" principles, the appeal must fall.

While it is admitted that "no verbal formula yet devised can explain prior finality decision with unerring accuracy or provide the utterly reliable guide for the future," (*Eisen v. Carlisle and Jocuelan*, 417 U. S. 156, at page 170 [footnote omitted]), still an Order containing words of restraint is not always an injunction. The words of restraint and the Order itself "... must be one telling the defendant to stop ... some substantive action at issue in the suit." (*Parents Committee of Public School 19, et al., Plaintiffs-Appellees v. Community School Board of Community School District #14, et al., Defendants-Appellants*, U.S.C.A., 2nd Circuit, J. Moore, conc. of J. Friendly, No. 1266, September Term, 1974, Arg'd July 16, 1975, Decided August 25, 1975, Docket No. 75-7297) (emphasis supplied).

This Court, by Friendly, Circuit Judge, in the concurring opinion in the "*Parents Committee*" case *supra*, cited, with approval 9 Moore, Federal Practice, sec 110.20 [I] at 232 (1973) when the Court stated:

"(although 'ingenious counsel have found injunctions lurking in virtually every ruling that a district court can be called upon to make [,] [F]or the most part, the courts have declined to explain the historic concept of an injunction'). That the order does not fit traditional notions of discovery does not mean that it is an interlocutory injunction . . ." (emphasis supplied)

As recently as August of this year, this Court has recognized a District Court's inherent power to Order, with relation to discovery proceedings, a party to do or not do many things, and unless the Order comes within the "narrow bounds" (*Parents Committee* case, *supra*) of stopping some "substantive action at issue in the suit" (*Parents Committee* case, *supra* emphasis supplied) the Order is not appealable.

POINT II

The Order of Judge Costantino merely interpreted the stipulation entered into by Texas Eastern. The record is clearly indicative of Judge Costantino's sensitivity to the inherent federal/state problems.

Texas Eastern has stated that Judge Costantino was "clearly unreasonable" (Brief of Defendants-Appellants, p. 18) in his Memorandum and Order under review. They have stated Judge Costantino "pressured" Texas Eastern (*Id.* at p. 19); that he "expressed annoyance" at Texas Eastern's handling of the State Court action (*Id.* at p. 19); that he was "twisting language" to accomplish his "expressed preference" (*Id.* at p. 20) which is "patently erroneous" (*Id.* at p. 15). They have accused him of clearly and "completely disregard[ing]" constitutional policy (*Id.* at p. 15).

It may be that Texas Eastern stated these comments without fully regarding the transcripts contained in the Appendix which they prepared. A complete reading of the transcripts fully evidences Judge Costantino's continuous and constant efforts to fairly and equally treat all litigants in the Federal Court action as well as the State Court action.

As he stated:

"There are people in this court who are plaintiffs and defendants, and I will issue each and every Order necessary in order to facilitate the case, and that is what I am doing in this case." (A, p. 59a)

and again:

"I will state again on the record that I have no intention of usurping any State Court judge's position including any judge in Kings County. I have my own work to do and they have also." (A, p. 80a)

and again:

". . . and we are at a point where discovery will be speedily entered into by all parties, including plaintiff . . ." (A, p. 54a)

Indeed Judge Costantino expressed on more than one occasion his feelings that whatever problems were occasioned in this case were not the fault of any single litigant.

"None of the problems, none of the problems that have arisen at this point were caused by any one defendant. They were caused by the multi situation of the case itself . . ." (A, p. 127a)





The case at bar has been before Judge Costantino for more than two and one-half years. He "... ha(ve) been through the whole Congressional Record and the Fire Department and have had—have seen pictures regarding polyurethane and dummies running through cars—the whole gamut—" (A, p. 88a) He has "... had many, many conferences involving at times forty-five attorneys, and whether certain defendants were involved, and who the defendants involved were, and the question of damages, and whether some of the defendants could be let out, and whether TETCO was a defendant. That was done to narrow the issues, and that is not wasting time." (A, p. 58a)

After all of this, Judge Costantino set forth his full understanding of the reasoning behind the stipulation at issue when he said:

"I was here. I know what you are talking about. It wasn't a question of contemplation, I heard everybody say it. My understanding was, you weren't going to do a thing in Texas until we were at least able to have all the depositions taken in New York and that's what I understood.

I know of no double-talk at the time even though the language is simple." (A, p. 127a)

It can, therefore, be seen that Judge Costantino, by his August 1, 1975, Memorandum and Order, was simply interpreting and enforcing his own prior Order, based not only on his full understanding of the parties intentions at the time the stipulation was entered into but also was upon a long and intimate involvement with the complexities of this case and the parties hereto.

POINT III

The Memorandum and Order at issue specifically was not based upon Title 28, Section 2283 of the United States Code.

It is freely admitted that Dow moved for a "2283" stay as well as further moving for a restraining Order pursuant to FRCP 65, however, neither 2283 stay nor a restraining Order pursuant to FRCP 65 are at issue herein. In consideration of the stipulation (A, pp. 91a-92a) Dow withdrew its FRCP 65 motion (A, p. 93a), and it was clearly understood by all that "the stipulation applies only to discovery." (Id.). Further it was clearly stated that *in addition* to the stipulation (Re: discovery) Dow *specifically* was going to continue to press its "2283" motion (Id.). That motion was subsequently "held in abeyance" by Judge Costantino (A, p. 99a) and in fact is *still* held in abeyance.

The Order at issue applies solely to discovery procedures *by* Texas Eastern *against* Dow in the State Court action. It does *not* preclude any discovery *by* Texas Eastern *against* Battelle in the State Court action, nor does it preclude Texas Eastern State Court counsel from participating in the Federal Court discovery of Dow, which is ongoing.

It should be noted that the delay of the June 2nd trial date was not occasioned by Dow. Indeed, as Texas Eastern counsel stated:

"We applied during the month of MAY, Your Honor, for deferral of the trial . . ." (A, p. 127a)

The position of Texas Eastern is thereby reduced to the following proposition:

Texas Eastern knew the stipulation was separate and distinct from the "2283" motion. They knew the stipulation was made in consideration of Dow's withdrawal of its FRCP 65 motion. They desired an adjournment of the scheduled June 2nd trial date and in fact applied for same. The intent of the stipulation was known to all, except (allegedly) Texas Eastern, and Texas Eastern is now chagrined by the result.

As evidenced by all the information before this Court, Texas Eastern should not now be heard to complain.

CONCLUSION

The Honorable Judge Mark A. Costantino's August 1, 1975, Order was but an interpretation and enforcement of his own prior Order, based upon a stipulation of the parties freely and knowingly entered into. It is, therefore, within the District Court's discretion to issue such an Order and said Order is nonappealable.

Respectfully submitted,

RIVKIN, LEFF & SHERMAN,
Attorneys for Defendant,
The Dow Chemical Company

Of Counsel:

LEONARD L. RIVKIN
BRUCE SMITH

Dated: Freeport, New York
October 14, 1975

UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

ERIA

VS

TAXAS EASTERN TRANSMISSION

AFFIDAVIT
OF SERVICESTATE OF NEW YORK
COUNTY OF NEW YORK

, ss:

AFRIM HASKAJ

deposes and says that he is over the age of 18 years and resides at 1481 42nd st
Brooklyn, N.Y.

That on the 15th day of October, 1975

he served the annexed brief of defendant-appellee

upon

LeBoeuf, Lamb, Leiby & MasRae, One Chase Manhattan Plaza, N.Y, N.Y.
in this action, by delivering to and leaving with said attorneys
three true cop thereof.DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 15th
day of October, 1975 19

Afrim Haskaj

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977